Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

JOYCE BROWN and LOIS SULLIVAN,

Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT)
and
LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON, and HERMAN HORN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

JERRY A. RICHARDSON
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, OK 74103
(918) 585-9211

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Opinions Below 2

Jurisdictional Statement 2

Oklahoma Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Summary of Reasons For Denying Petitioners' Request 5

Reasons for Denying the Petition for Writ of Certiorari 6

I. The Oklahoma Constitution *Prohibits* School District Support Employees from Having a Property Interest in *Renewal* of Their Employment Contracts from Year to Year 6

A. Property Interests Arise from State Law, not Federal Law 6

B. Under Oklahoma Law, Petitioners' Property Interests Were *Limited* to the Duration of their Employment Contracts 8

II. Respondent School District's Policies Cannot Create a Property Interest Prohibited by the Oklahoma Constitution or Be Construed to Contradict the Express Terms of Petitioners' Written Contracts 17

Conclusion 20

APPENDIX A A-1

TABLE OF AUTHORITIES

Page

CASES

Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985) 16

Board of Education v. Challey, 153 Okla. 273, 5 P.2d 747 (1931) 10

Board of Education v. McCluskey, 458 U.S. 966 (1982) 18

Board of Regents v. Roth, 408 U.S. 564 (1972) 1, 6, 8, 17

Brookman Co. v. Board of Commissioners, 136 Okla. 85, 276 P. 474 (1929) 9

Brookpark Entertainment, Inc. v. Taft, 951 F.2d 710 (6th Cir. 1991) 7

Brown v. Independent School District I-06, No. CIV-90-311-C (E.D. Okla.) 2, 19

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 6, 13

Delta Air Lines v. August, 450 U.S. 346 (1981) 19

Dungan v. Independent School District No. 39, 182 Okla. 385, 77 P.2d 1117 (1938) 10

Fox v. Cities Service Oil Co., 201 Okla. 17, 200 P.2d 398 (1948) 18

Gentis v. Hunt, 121 Okla. 71, 247 P. 358 (1925) 10

Goudeau v. School District No. 37, 823 F.2d 1429 (10th Cir. 1987) 8, 16

Hall v. O'Keefe, 617 P.2d 196 (Okla. 1980) 16

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 6, 7

Mindemann v. Independent School District No. 6, 771 P.2d 996 (Okla. 1989) 19

TABLE OF AUTHORITIES – Continued

Page

School District No. 39 v. Shelton, 26 Okla. 229, 109 P. 67 (1910) 20

Sullivan v. Independent School District No. I-06, No. CIV-90-312-C (E.D. Okla.) 3

Umholtz v. City of Tulsa, 565 P.2d 15 (Okla. 1977) 16

CONSTITUTIONAL PROVISIONS

OKLA. CONST. Art X, § 1 (1991) 9, 11

OKLA. CONST. Art. X, § 26 (Supp. 1992) 2, 9, 10, 11, 12, 16

STATUTES

OKLA. STAT. tit. 70, § 5-117 (1991) 19, 20

OKLA. STAT. tit. 70, § 5-123 (1991) 2, 13

OKLA. STAT. tit. 70, § 6-101 (1991) 11

OKLA. STAT. tit. 70, § 6-101.3 (1991) 8, 14

OKLA. STAT. tit. 70, § 6-101.40 (1991) ..... *passim*

OKLA. STAT. tit. 70, § 6-101.41 (1991) 14

OTHER AUTHORITIES

80 Op. Att'y. Gen. 272 (November 6, 1980) 12

82 Op. Att'y. Gen. 62 (March 3, 1982) 4, 13

PUBLICATIONS

1955 Okla. Sess. Laws 561 11

Websters Unabridged Dictionary 1883 (2d ed. 1983) 15

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, Independent School District No. I-06 of McCurtain County, Oklahoma (the "School District"), Larry Thompson, Chris Columbus, Norman Ranger, James P. Brinkley and Charles Whittington (the "Board"), and Herman Horn ("Horn"), respectfully pray that this Honorable Court deny the Petitioners' request for a writ of certiorari. Respondents believe that the United States Court of Appeals for the Tenth Circuit correctly interpreted Oklahoma law when it determined that Petitioners did not have a property interest in the renewal of their expired contracts of employment. It is settled beyond dispute that property interests are not created by the Constitution; "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . " *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Oklahoma law does not create in Petitioners a property interest in contract renewal.

Moreover, the issues raised by Petitioners' two questions turn entirely upon an analysis of Oklahoma law. Accordingly, the decision of the Tenth Circuit in this case presents neither a conflict among the circuit courts of appeal nor an interpretation of federal law. This case is of significance solely within the state of Oklahoma and solely because of its interpretation of Oklahoma law. For these reasons, Respondents respectfully ask that Petitioners' request for a writ of certiorari be denied.

OPINIONS BELOW

See Petitioners' Appendix A1 - A8, B1 - B9, C1 - C2 and D1 - D2.

JURISDICTIONAL STATEMENT

Respondents accept Petitioners' jurisdictional statement.

OKLAHOMA CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of OKLA. CONST. ART. X, § 26 (Supp. 1992) and OKLA. STAT. tit. 70, § 5-123 (1991) are reprinted in the Appendix to the Brief in Opposition, at A1 - A3.

STATEMENT OF THE CASE

Petitioners' Statement of the Case repeatedly characterizes as "terminations" the decisions of Respondent Board not to offer Petitioners Brown and Sullivan new contracts of employment upon the expiration of their existing contracts. Petitioners' Brief, p. 4. Yet the record establishes that the Respondent Board took absolutely no action *to bring about* the end, conclusion or finish[1] of Petitioners' employment (*see* brief in Support of Motion to Dismiss, filed August 9, 1990, *Brown v. Independent School District I-06*, No. CIV-90-311-C (E.D. Okla.); Brief in

[1] *See* Petitioners' Brief, p. 13.

Support of Motion to Dismiss, filed August 9, 1990, *Sullivan v. Independent School District I-06*, No. CIV-90-312-C (E.D. Okla.))[2]. Rather, the record shows that it is undisputed that Petitioners were employed under express written contracts with terms stating when their employment would expire:

> The contract term shall be . . . [o]n a month to month basis during the school year, beginning on the 15[th] day of August, 1988, and continuing each month thereafter *for the balance of the school fiscal year unless employment is terminated, but in no event to extend beyond June 30, 1989 unless a new written contract is entered into by the parties*. . . .

Petitioners' Appendix at A3 (emphasis added).

The only action taken by the Respondent Board was to *notify* Petitioners that the Board did not intend to enter into new contracts of employment with them for the upcoming fiscal year (*see* Exhibit D to Briefs in Support of Motion to Dismiss, filed August 9, 1990, *supra*).

Respondents understand that Petitioners now take the position that they were terminated.[3] But because whether Petitioners were, in fact, "terminated" within the meaning of OKLA. STAT. tit. 70, § 6-101.40 (1991) is central to the issues Petitioners are asking this Court to review,

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[2] By Order dated January 22, 1991, the District Court consolidated the two cases.

[3] Respondents address Petitioners' "ordinary meaning" argument concerning the definition of "termination" at p. 15, *infra*.

and because Petitioners' contention that they were "terminated" has been rejected by both the District Court and the Tenth Circuit, Respondents believe it is inappropriate for Petitioners to suggest in their Statement of the Case that the facts of this case establish that they were "terminated."

Respondents would also point out that Petitioners incorrectly assert that Petitioner Joyce Brown was first employed in August of 1981, without a written contract. Petitioners' Brief, p. 3. The undisputed facts as found by the District Court establish that Petitioner Brown was first employed in 1982 and signed a contract of employment in each year of her employment.[4] Petitioners' Appendix at B2 - B3.

The lower courts correctly concluded that Petitioners' employment status was governed by the terms of their written contracts. This conclusion is mandated not only by the terms of Petitioners' contracts, but also by express provisions of the Oklahoma Constitution and Oklahoma's statutory law. Petitioners' attempt to fabricate some kind of property interest in contract renewal from the language of OKLA. STAT. tit. 70, § 6-101.40 (1991) flies directly in the face of the Oklahoma Constitution. Likewise, their attempt to divorce their "employment status" from their

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[4] Petitioner Lois Sullivan did work from 1975 until 1982 without signing a written employment contract. In 1982, the Oklahoma Attorney General issued an interpretation of Oklahoma law stating that it was unlawful for school districts to employ support employees except pursuant to the terms of a written contract. *See* 82 Op. Att'y. Gen. 62 (March 3, 1982), discussed at p. 13, *infra*.

"contract" is flatly contrary to Oklahoma statutory law. Because the Tenth Circuit correctly determined that Oklahoma law does not *allow* the property interests claimed by Petitioners, the Tenth Circuit's decision should stand.

SUMMARY OF REASONS FOR DENYING PETITIONERS' REQUEST

Petitioners' request for a writ of certiorari should be denied because the Tenth Circuit correctly applied Oklahoma law in determining that Petitioners did not have a property interest entitling them to renewal of their expired contracts. The requested writ should also be denied because the questions presented raise only issues of Oklahoma law.

In conformity with an authorizing provision of the Oklahoma Constitution, the Oklahoma legislature has granted *teachers* the statutory right to continuing employment and contract renewal from year to year. Support employees such as Petitioners do not fall within the coverage of this continuing contract statute or the exception in the Oklahoma Constitution allowing such an employment practice. Support employees are thus prohibited by the Oklahoma Constitution from having a property interest in employment that extends beyond the term of a one-year contract.

Oklahoma law also makes it unlawful for school districts to employ support employees except pursuant to the terms of a written contract. Thus, under Oklahoma law, a support employee's employment interest is not

severable from his contract; the contract creates, limits and defines the employment interest.

Petitioners were employed under express written contracts for a definite term. Neither the contracts nor the Respondent School District's policy manual granted Petitioners a right to contract renewal. Under Oklahoma law, the *express* provisions of Petitioners' contracts must govern, and the Respondent School District's policy manual cannot be interpreted as *implying* contradictory terms.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Oklahoma Constitution *Prohibits* School District Support Employees from Having a Property Interest in *Renewal* of Their Employment Contracts from Year to Year

A. Property Interests Arise from State Law, Not Federal Law

Petitioners cite *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), for the remarkable proposition that the existence of a property interest is a matter of federal law. Petitioners' Brief, pp. 8-9. Petitioners thus suggest that *Memphis Light* reflects some departure or retreat from the holding of *Board of Regents v. Roth*, 408 U.S. 564 (1972). Yet this Court has consistently cited *Roth* for the proposition relied on by Respondents, that property interests are created by state law. Indeed, this Court in *Memphis Light* relied on *Roth* for that very point, *Memphis Light*, 436 U.S. at 9, as it did again in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985).

Respondents submit that the proper analysis of *Memphis Light* was followed by the Sixth Circuit in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991). There the issue was whether a liquor license was property under Ohio law. The Sixth Circuit stated:

> The license may rise to the level of property under the Due Process Clause even though Ohio chooses not to call it property. "[W]e must look behind labels, and decide whether the plaintiff's license was 'property' in a functional sense. . . ." In short, we look to Ohio law to determine the *nature* of the interest, not the *label* to apply to it.

Id. at 714 (citation omitted; emphasis added). The Sixth Circuit then considered the various interests that, under Ohio law, accompanied the granting of a liquor license in that state. Those interests included the statutory rights to transfer, sell, bequeath and renew the liquor license, as well as the right to a hearing before the liquor license could be revoked and the right to appeal an adverse determination. The key point, however, is that all of these appurtenant interests stemmed from Ohio law, not federal law. Accordingly, it cannot be disputed that the *source* of any property interest entitled to protection under the fourteenth amendment must be *state* law.

In this case, an examination of the *nature* of the interest granted to Petitioners by Oklahoma law leads to the inescapable conclusion that Oklahoma has not created in them a property interest in the renewal of their expired contracts.

B. Under Oklahoma Law, Petitioners' Property Interests Were *Limited* to the Duration of Their Employment Contracts

Petitioners rely on OKLA. STAT. tit. 70, § 6-101.40 (1991), which provides that support employees[5] shall be subject to "suspension, demotion or termination only for cause." Petitioners' Appendix at F1. Petitioners contend that this provision establishes a property interest in continued employment, entitling them to renewal of their expired contracts from year to year, regardless of the express provision to the contrary in their written contracts.

Neither Petitioners nor Respondents take issue with the Tenth Circuit's earlier construction of the prior codification of section 6-101.40 in *Goudeau v. School District No. 37*, 823 F.2d 1429 (10th Cir. 1987). There the court held that a support employee who was *terminated* by the school district *during the term of her contract* had a right to a due process hearing. *Id.* at 1430, n. 1. Respondents agree that support employees who fall within the coverage of this statute clearly have a property interest in continued employment for the *term* of their contracts. But at least since *Board of Regents v. Roth*, 408 U.S. 564 (1972), it has been well established that a property interest in employment, once created, is not infinite. Rather, a property interest in employment can exist for the duration of a

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[5] All school district employees in Oklahoma fall into one of two categories: certificated personnel (teachers and administrators, OKLA. STAT. tit. 70, § 6-101.3 (1991)), or support employees (non-certified personnel such as secretaries, bus drivers, cafeteria workers, etc.).

specified term. Once that term expires, as did Petitioners' herein, the property interest also expires, unless state law has created an interest in contract *renewal*.

Petitioners urge that section 6-101.40 does create an interest in contract renewal in favor of support employees. Yet Petitioners' interpretation of section 6-101.40 is squarely prohibited by the "debt limitation" provision of the Oklahoma Constitution, OKLA. CONST. Art. X, § 26 (Supp. 1992) Appendix at A1-A3. This constitutional provision prohibits political subdivisions, such as school districts, from incurring any indebtedness beyond the income and revenue available for the current fiscal year.

The importance of this constitutional provision to matters relating to the expenditure of public funds was made clear by the Oklahoma Supreme Court in *Brookman Co. v. Board of Commissioners*, 136 Okla. 85, 276 P. 474 (1929). Referring to OKLA. CONST. Art. X, § 26, the court stated:

> That provision is subject to no emergency, pays no heed to convenience, expediency or emergency. It is sane, safe, unconditional, and, so far as human documents can be so regarded, should be held sacred in its observance, interpretation, and enforcement. Once this clear protecting mandate is whittled away, reasoned around, or disregarded, for any cause, the chief guaranty of our orderly municipal progress, whether in state, county, city, town, township, or school district, is threatened.

Id. at ___, 276 P. at 477.

Oklahoma courts have cited this provision of the Oklahoma Constitution as prohibiting school district

employees from having multi-year contracts. *Board of Education v. Challey*, 153 Okla. 273, 5 P.2d 747 (1931); *Gentis v. Hunt*, 121 Okla. 71, 247 P. 358 (1925). In *Dungan v. Independent School District No. 39*, 182 Okla. 385, 77 P.2d 1117 (1938), the plaintiff was a school district superintendent who had been employed under a three-year contract pursuant to a statute (section 6875) that purported to authorize such three-year contracts. The plaintiff brought suit after the board of education refused to honor the third year of the contract. The trial court sustained the defendant's demurrer and held section 6875 unconstitutional. On appeal, the Oklahoma Supreme Court stated:

> We think the trial court committed no error in so holding. Insofar as section 6875 . . . authorizes an independent school district board to contract with a superintendent during one fiscal year for services to be performed during a subsequent fiscal year, it is unconstitutional, being in violation of section 26, article 10 of the Oklahoma Constitution. . . . Therefore, insofar as the petition relies on the contract entered into in 1932, no cause of action is stated and the trial court properly sustained the general demurrer thereto.

Id. at ___, 77 P.2d at 1119.

This authority, standing alone, amply demonstrates the flaw in Petitioners' argument. But there is far clearer proof of Petitioners' faulty reasoning in the connection between OKLA. CONST. Art. X, § 26 (Supp. 1992) and the statutory right to continuing employment that Oklahoma has granted to *teachers*.

As Petitioners point out at page 12 of their brief, as to teachers the Oklahoma legislature has recognized a distinction between "nonrenewal" of employment and "dismissal." This is because Oklahoma's *teachers*, unlike support employees, have the *express* statutory right to continued employment from one year to another. This law, found at OKLA. STAT. tit. 70, § 6-101 (1991), provides that if a board of education does not notify a teacher prior to April 10 of its desire not to reemploy him for the upcoming school year, such teacher shall automatically be reemployed by operation of law for another fiscal year.[6]

Before this statutory right to continuing employment could be granted, however, OKLA. CONST. Art. X, § 26 had to be *amended* to add the following proviso:

> . . . and provided further that nothing in this section shall prevent any school district from contracting *with certificated personnel* for periods extending one (1) year beyond the current fiscal year, under such conditions and limitations as shall be prescribed (emphasis added).

See proposed constitutional amendment, 1955 Okla. Sess. Laws 561.

The constitutional amendment to Article X, section 26 that allowed the legislature to grant continuing contract rights to teachers is specifically *limited* to certificated personnel. Thus, school districts in Oklahoma continue to be prohibited from entering into multi-year contracts or continuing contracts with support employees.

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[6] The fiscal year for school districts in Oklahoma is July 1 through June 30. OKLA. CONST. Art. X, § 1 (1991).

This conclusion is further supported by an opinion of the Oklahoma Attorney General. In 80 Op. Att'y. Gen. 272 (November 6, 1980), the Attorney General discussed the interplay between OKLA. CONST. Art. X, § 26 and the teachers' continuing contract law, observing:

> Art. 10, § 26 is the "debt limitation" provision of the Constitution which . . . precludes local political subdivisions from incurring any indebtedness beyond the income and revenue for the current fiscal year. The exception provided . . . is for teacher contracts entered into in the current fiscal year to become effective in the next fiscal year. The proviso is a clear recognition of public school employment practices and the operation of the so-called "continuing contract" law for public school teachers.
>
> * * *
>
> Were it not for the exception in the last proviso of Art. 10, § 26, the "continuing contract" law would be of doubtful constitutionality.

In the face of this authority, the Tenth Circuit properly concluded that the protection against "termination" conferred on support employees by OKLA. STAT. tit. 70, § 6-101.40 (1991) could mean only "termination under an extant contract." *See* Petitioners' Appendix at A6. The interpretation urged by Petitioners would have resulted in the creation of a property interest in continued employment from year to year in *noncertified* school district employees, a result the Oklahoma Constitution forbids.

Petitioners' reasoning also suffers other flaws. Petitioners pay only lip service to their written contracts,

arguing that *"independent"* of any contract, section 6-101.40 creates a property interest in the Petitioners' retention of their *"employment status."* Petitioners' Brief at 15, n. 11 (emphasis in original). Yet the law of Oklahoma makes clear that it is illegal for a school district to expend over $500 for a support employee's salary "except in accordance with the provisions of a written contract. . . ." OKLA STAT. tit. 70, § 5-123 (1991); Appendix at A3; 82 Op. Att'y. Gen. 62 (March 3, 1982). Oklahoma law thus rejects the distinction Petitioners seek to draw between "contract" and "employment status." To the contrary, Oklahoma law clearly and affirmatively *links* a school employee's employment status with having a lawful written contract. Petitioners' suggestion that under Oklahoma law they can have some "employment status" that is "independent" of the terms of their written contracts is simply wrong.

Petitioners' Brief is devoid of any authority or argument regarding these points. The arguments Petitioners do raise can be disposed of easily.

Petitioners' attempt to compare their situation to that of the employee in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), cannot withstand scrutiny. *See* Petitioners' Brief, pp. 11-12. The parties in *Loudermill* conceded that Ohio law granted the employee there a property interest in continued employment. *Loudermill*, 470 U.S. at 538-39. The issue decided by this Court was "what process is due" under the fourteenth amendment. *Id.* at 541. Neither the decision in *Loudermill* nor the Ohio law cited therein is in any way instructive on the issue of Petitioners' claim to a property interest under Oklahoma law in the renewal of their expired contracts.

Petitioners also argue that the Oklahoma legislature must have intentionally used the "more generic" but undefined term "termination" in OKLA. STAT. tit. 70, § 6-101.40 (1991) to address situations such as theirs. Petitioners' Brief, pp. 12-13. Petitioners point out that in OKLA. STAT. tit. 70, § 6-101.41 (1991),[7] the defined[8] terms "dismissed" and "not reemployed" are used. The problem with this approach is that it proves too much. If, as Petitioners imply, the Oklahoma legislature intended "termination" to encompass both "dismissal" and "non-reemployment," why did the legislature not use "terminated" in section 6-101.41? Respondents submit that it is equally plausible to conclude that the legislature purposely avoided "termination" in § 6-101.41 precisely

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[7] OKLA. STAT.tit. 70, § 6-101.41 (1991) provides:

> A. A school support employee convicted of a felony shall be dismissed or not reemployed unless a presidential or gubernational pardon has been issued.
>
> B. A school support employee may be dismissed, refused employment or not reemployed after a finding that such person has engaged in criminal sexual activity or sexual misconduct that has impeded the effectiveness of the individual's performance of school duties.

[8] Petitioners fail to note that these terms are *defined* solely with reference to actions against *certificated* employees. OKLA. STAT. tit. 70, § 6-101.3 (1991) provides:

> 2. "Dismissal" means the discontinuance of the teaching service of an administrator or teacher during the term of a written contract, as provided by law;
>
> 3. "Nonreemployment" means the nonrenewal of an administrator's or teacher's contract upon expiration of the contract[.]

because termination is synonymous with dismissal, and the legislature wanted to make it clear that school districts should not only terminate the existing contract of a support employee convicted of a felony, but should also decline to reemploy[9] such a support employee if his current contract had already expired. This reading suggests that the legislature viewed "termination" as a more narrow term than "dismissal" and "nonreemployment," not, as Petitioners suggest, a more inclusive term.

Petitioners suggest that the "ordinary meaning" of "termination" is broad enough to encompass the failure of the Respondent Board to renew Petitioners' contracts. Petitioners' Brief, p. 13. Yet, the same source cited by Petitioners[10] also defines "termination" as "the act of terminating." "Terminate," in turn, is defined as "to bring to an ending or cessation in time, sequence, or continuity," and "to discontinue the employment of." By the "ordinary meaning" of these definitions, an affirmative act is required to bring about a termination. Yet the Respondent Board took no action to bring Petitioners' employment to an end; their contracts expired by their own terms.

As for Petitioners' reliance on the Oklahoma Legislature's preference for liberal interpretation of statutes, it need only be noted that statutory interpretations that are prohibited by the Oklahoma Constitution cannot be

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[9] Petitioners also fail to note that the term defined in section 6-101.3 is "nonreemployment," yet the term used in 6-101.41 is "not reemployed." *See* nn. 7 and 8, *supra*.

[10] Websters Unabridged Dictionary 1883 (2d ed. 1983).

resuscitated under the guise of "liberal statutory interpretation."

Likewise, there was no suggestion in any of the Oklahoma municipal employee cases cited by Petitioners[11] that OKLA. CONST. Art. X, § 26 was in any way implicated. Respondents are aware of no Oklahoma statute requiring municipal employees to work under annual contracts of employment, as are school district employees.[12]

Petitioners argue that the Tenth Circuit has approved a "crabbed construction" of "termination" that renders section 6-101.40 an "illusory cruel joke." Petitioners' Brief, pp. 15-17. Yet it is the Oklahoma Constitution, not the Tenth Circuit's reading of section 6-101.40, that makes the property interest sought by Petitioners "illusory." Moreover, as the Tenth Circuit's holding in *Goudeau*, 823 F.2d at 1431-32, illustrates, the protection against termination without cause is not at all illusory during the term of a support employee's contract. In addition, section 6-101.40 prohibits school districts from employing support employees under contracts that are terminable at will. Clearly, such a result is not an illusory protection.

Finally, Petitioners' suggestion that there is now an inter-circuit split as a result of the Tenth Circuit's decision in this case is pure fabrication. Petitioners' Brief, pp. 8, 17-18. The cases cited by Petitioners do not deal with constitutional/statutory schemes comparable to that of

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[11] *See Bailey v. Kirk*, 777 F.2d 567 (10th Cir. 1985); *Hall v. O'Keefe*, 617 P.2d 196 (Okla. 1980); *Umholtz v. City of Tulsa*, 565 P.2d 15 (Okla. 1977).

[12] *See* p. 13, *supra*.

Oklahoma. Nor is it at all remarkable for a court of appeals to conclude, as did the Tenth Circuit here, that Petitioners' property interests were created by their contracts and thus expired when their contracts of employment expired. *See Board of Regents v. Roth*, 408 U.S. at 578.

Petitioners' arguments are without merit. Their request for a writ of certiorari to further litigate a question of Oklahoma law should be denied.

II. Respondent School District's Policies Cannot Create a Property Interest Prohibited by the Oklahoma Constitution or Be Construed to Contradict the Express Terms of Petitioners' Written Contracts

Petitioners assert that the terms of the Respondent School District's policy manual[13] created in them a property interest in the renewal of their expired contracts of employment. Without further belaboring the point, Respondents submit that the terms of the policy manual cannot, as a matter of Oklahoma law, create a property interest in continued employment from year to year when such is prohibited by the Oklahoma Constitution. Moreover, the language from the policy manual on which Petitioners rely says absolutely *nothing* about contract renewal. Instead, it speaks of "dismissal" and "continuation of employment." As even Petitioners concede that a "dismissal" under Oklahoma law means the interruption of an existing contractual relationship, "continuation of employment" must logically refer to the continuation of

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[13] *See* Petitioners' Appendix at G1.

an *existing* contractual relationship. Such an interpretation is perfectly consistent with Oklahoma law.

Given that the policy manual is silent as to contract renewal, Petitioners seek to have this Court *imply* a term not found in the policy manual that is directly contrary to the express provisions of their contracts. But in *Fox v. Cities Service Oil Co.*, 201 Okla. 17, 200 P.2d 398 (1948), the Oklahoma Supreme Court held that an *express contract* on a given subject *excludes* the possibility of an *implied contract* of a different or contradictory nature. Thus, under Oklahoma law, this Court should not imply a term that is contradictory to an express term in a written contract. For this reason, Petitioners' reliance on the policy manual is misplaced.

In addition, the construction given by the Respondent School District to its own policy manual must control if that construction is reasonable. *Board of Education v. McCluskey*, 458 U.S. 966 (1982). In *McCluskey*, this Court took the lower court to task for substituting its judgment for the judgment of the board of education concerning the interpretation of the school district's regulations. The Court held that the board of education's construction of its own rules must govern if that construction is reasonable. *Id.* at 970-71. In this case, the Respondent Board's construction of its policy manual, as adopted by the Tenth Circuit, is perfectly reasonable and consistent with Oklahoma law.

Finally, Petitioners seek to rely on allegations contained in Petitioners' Affidavits that Respondent Horn made verbal assurances to them of continued employment. Petitioners' Brief at 23-24. This claim was never

raised before the Tenth Circuit and is nowhere discussed in Petitioners' briefs to the Tenth Circuit. *See* Appellants' Brief-in-Chief and Reply Brief of Appellants, *Brown v. Independent School District No. I-06*, 974 F.2d 1237 (10th Cir. 1992) (No. 91-7058). Accordingly, Petitioners cannot now raise such a claim before this Court. *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981).

Moreover, reliance on such alleged verbal assurances is misplaced for another reason. The Oklahoma legislature unequivocally granted the authority to employ support employees to *boards of education*. OKLA. STAT. tit. 70, § 5-117 (1991).[14] For Respondent Horn to have had any ability to bind Respondent School District, Respondent Board would have had to delegate such authority to him. Oklahoma law does not allow such delegation, however.

In *Mindemann v. Independent School District No. 6*, 771 P.2d 996 (Okla. 1989), the Oklahoma Supreme Court invalidated a purported delegation by a board of education of its statutory authority. The statute in question, OKLA. STAT. tit. 70, § 5-117, grants specific, enumerated powers to boards of education and is the identical statute implicated by Petitioners' argument. The issue in *Mindemann* was whether a board of education could voluntarily surrender its statutory authority to fix

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[14] A. The board of education of each school district shall have the power to:

* * *

14. Contract with and fix the duties and compensation of . . . superintendents, principals, teachers, bus drivers, janitors, and other necessary employees of the district. . . .

teachers' duties by agreeing to submit such questions to binding arbitration. The Oklahoma Supreme Court concluded that the board could not surrender this nondelegable and exclusive authority.

The Respondent Board's statutory authority under section 5-117 to contract with support employees is exclusive and nondelegable, just as is its statutory duty to fix teachers' duties. It would be extremely anomalous, to say the least, to conclude that a board of education's duty to fix teachers' duties under section 5-117 cannot be delegated, but that its duty to contract with employees under the same statute can be delegated. Because school districts can make employment contracts *only* through the actions of the board of education acting in its capacity as a board, *School District No. 39 v. Shelton*, 26 Okla. 229, 109 P. 67 (1910), Petitioners' reliance on the alleged statements of Respondent Horn is misplaced.

CONCLUSION

For the reasons stated herein, Respondents pray that Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

JERRY A. RICHARDSON
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, OK 74103
(918) 585-9211

Counsel of Record
for Respondents

APPENDIX A

OKLA. CONST. Art. X, § 26 (Supp. 1992)

(a) Except as herein otherwise provided, no county, city, town, township, school district, or other political corporation, or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor, in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five percent (5%) of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness: Provided, that if a school district has an absolute need therefor, such district may, with the assent of three-fifths of the voters thereof voting at an election to be held for that purpose, incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding five percent (5%) but not exceeding ten percent (10%) of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness, for the purpose of acquiring or improving school sites, constructing, repairing, remodeling or equipping buildings, or acquiring school furniture, fixtures or equipment; and such assent to such indebtedness shall be deemed to be a sufficient showing of such absolute need, unless otherwise provided by law. Provided further, that if a city or town has an absolute need therefor, such city or town may, with the assent of

three-fifths of the voters thereof voting at an election to be held for that purpose, incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding five percent (5%) but not exceeding ten percent (10%) of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness, and such assent to such indebtedness shall be deemed to be a sufficient showing of such absolute need unless otherwise provided by law. Provided, further, that any county, city, town, school district, or other political corporation, or subdivision of the state, incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five (25) years from the time of contracting the same, and provided further that nothing in this section shall prevent any school district from contracting with certificated personnel for periods extending one (1) year beyond the current fiscal year, under such conditions and limitations as shall be prescribed by law.

(b) If a county approves an exemption of household goods of the heads of families and livestock employed in support of the family from ad valorem taxation pursuant to the provisions of subsection (b) of Section 6 of this article, the percentage limitations on indebtedness as specified in subsection (a) of this section for political subdivisions or political corporations located in any such county shall be adjusted by multiplying the percentage

levels specified in subsection (a) of this section by the millage adjustment factor as specified in subsection (b) of Section 8A of this article.

(c) If approved by the people, the amendment to this section shall become effective January 1, 1993.

OKLA. STAT. tit. 70, § 5-123 (1991)

No expenditure involving an amount greater than Five Hundred Dollars ($500.00) shall be made by a board of education except in accordance with the provisions of a written contract or purchase order, and no contract involving an expenditure of more than Seven Thousand Five Hundred Dollars ($7,500.00) for the purpose of erecting any public building or making any improvements shall be made except upon sealed proposals and to the lowest responsible bidder. Provided, this section shall not be construed to prohibit a school district from erecting a building or making improvements on a force account basis. Contracts with any state agency for the purpose of emergency asbestos abatement shall be exempt from the provisions of this section.